

The University of Chicago

SENATOR THOMAS J. WALSH AND
THE VINDICATION OF
LOUIS D. BRANDEIS

A PART OF A DISSERTATION SUBMITTED TO
THE FACULTY OF THE DIVISION OF THE
SOCIAL SCIENCES IN CANDIDACY FOR THE
DEGREE OF DOCTOR OF PHILOSOPHY

DEPARTMENT OF HISTORY

AUGUST, 1940

By
MILES WILLIAM DUNNINGTON

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THE VINDICATION OF MR. BRANDEIS

Senator Thomas J. Walsh was born in Two Rivers, Wisconsin, in 1859. Following his graduation from the public schools of that place he taught for several years, and then entered the University of Wisconsin to study law. After receiving his degree in 1884 he went first to the territory of Dakota, and then to Helena, Montana in 1890, where he established a large practice.

His reputation for fairness, his honest regard for the spirit of the law, and his keen legal ability became widely known throughout the inter-mountain region. Yet above all else, his qualities of independence and sound liberalism, revealed in many hard fought cases against powerful corporate interests, won for him the reputation of unswerving loyalty to the principle of equal justice under law.

When Walsh was elected to the Senate of the United States in 1913 he was recognized as one of the outstanding trial lawyers in the west, if not the foremost in his State. As a member of the Senate Committee on the Judiciary, he displayed the same liberal attitude which, in a broader setting and in matters of greater consequence, brought him nation-wide prominence.

In later years, when Walsh looked back upon his work in the Sixty-fourth Congress he placed his successful struggle for the vindication of Louis D. Brandeis first among the things giving him greatest satisfaction. As a member of the subcommittee of the Senate Committee on the Judiciary to which the nomination of Brandeis to the Supreme Court had been referred, he had conducted the examination of many witnesses appearing for and against the nominee. Of more especial support to Brandeis, Walsh had argued against the incoming report of the opposing members of the subcommittee, and had spared no feelings in denouncing the unfair presentations of the case made by Senators Works and Cummins.¹

¹Walsh to John Temple Graves, August 20, 1919; Walsh Papers, Library of Congress.

All this had come about when President Wilson named Mr. Brandeis to succeed Justice Joseph R. Lamar. According to the talk among newspaper men, Wilson had first thought of Walsh in filling this vacancy, and in the Senate there was enthusiastic speculation on this possibility. One morning Senator Shields startled Walsh with the report that there was a conspiracy afoot "to put him out of the Senate." To a man of such serious manner as Walsh the remark was indeed alarming, but Shields restored his equanimity by adding that the conspirators wanted to put him on the Supreme bench. Twice since his election to the Senate he had been considered for this high place, yet he never coveted it. To his friend Nolan he confided: "It is needless to say that I am without ambition and have not even considered what course I would take in the event the place was tendered to me."²

When the Brandeis appointment was announced, public opinion in Montana quickly crystallized in varying attitudes. Organized labor as a whole favored confirmation,³ but farmers and lawyers generally disapproved what they termed Brandeis' "grand-standing" in the defense of Gifford Pinchot.⁴ Nor did any Montana representative need to be reminded "that few in the West liked Mr. Pinchot's ideas of handling the matters he has tried to get into."⁵ Protests of this sort, "just a little warped by reason of racial prejudice," drew firm replies from Walsh which revealed the independent quality of his own character: "I have an open mind touching the serious charges that are made against the nominee affecting his personal and professional integrity. If those claims are not sustained, I am for him."⁶

However much the substance of disparaging comments might reveal of individual attitudes, scarcely nothing could have weighed more heavily against Brandeis than the almost sacrosanct dictum of outstanding members of the American Bar Association.

²Walsh to C. B. Nolan, January 14, 1916; Walsh Papers.

³M. M. Donoghue (president Montana Federation of Labor) to Walsh, February 1, 1916; Walsh Papers.

⁴Brandeis defended L. R. Glavis in the Ballinger-Pinchot controversy.

⁵Jerry W. Farrell to Walsh, February 6, 1916; Walsh Papers.

⁶Walsh to Jerry W. Farrell, February 14, 1916; Walsh Papers.

When William Howard Taft, President Lowell of Harvard, former Secretary of State Root, and men like Charles Francis Adams formally declared that Brandeis was unfitted for the Supreme Court because he lacked "the judicial temperament," their statement acquired the finality of a dogma in the minds of many people. It stimulated editorial comment hostile to the nominee, and after reading a bitter screed,⁷ Walsh remarked with glowing irony:

It is true as the paper says that the protest of Messrs. Taft and others is not to be treated lightly. It prompts some serious reflection, some of it directed at the gentlemen who signed the protest rather than touching the subject of it.⁸

If objections of such vagueness as "lacking the judicial temperament" reflected the sentiment of certain influential attorneys, there was more positive evidence to which those who supported Mr. Brandeis could refer with persuasive effect--his enviable career as a trial lawyer, and his clearly expressed philosophy of law. At the very time of the hearings before the Senate committee, two of Brandeis' articles appeared in Harper's Weekly, wherein he analyzed the humanitarian aspects of statutes designed to achieve a better social order.⁹

In these he argued that since the adoption of the Constitution, the nation had passed through a social and economic revolution which affected the life of the people more fundamentally than any political revolution in history. The courts, nevertheless, continued to ignore newly arising social needs, and complacently applied eighteenth century conceptions of individual liberty and the sacredness of private property. Even when statutes embodying the new social spirit were clearly constitutional, judges imbued with the fixed notion of individualism often construed them away. Nor had the bar in general been any more progressive; so that in most cases before the courts it was a matter of "the blind leading the blind."

While Senator Walsh made no direct remark on "the blind leading the blind," his own arguments made during the practice of law had stressed the rights of labor in terms of the broad social

⁷St. Louis Globe Democrat, March 15, 1916.

⁸Walsh to A. O. Herrmann, March 21, 1916; Walsh Papers.

⁹Louis D. Brandeis, "The Living Law," Harper's Weekly, LXII (February 19, 1916), 173-175; (February 26, 1916), 201-203.

implications, and in the Senate his consistent advocacy of every measure to improve social conditions concretely demonstrated his sympathy for Brandeis' ideas. Some few years later, in commenting upon a case vital to Montana agriculture, he did criticize the tardy action of the Supreme Court:

I wish they could be moved in some way to take more speedy action about these matters. It is unfortunate that so many of them hang on long after having arrived at the age when energetic action on the part of most men is impossible. The poor Chief Justice is very deaf and almost blind, and I cannot understand how he does the work at all. He is only seventy-six and not the most aged member of the bench. You cannot understand, however, how delicate a matter it is to suggest, under any circumstances, and particularly under the circumstances referred to, that more speedy action on their part is desired or advisable.¹⁰

On February 9, the hearings opened in the Judiciary Room of the Capitol. Walsh was there every morning, carefully examining the evidence as each witness presented it. Now and then he interjected a question; at other times he interrupted to point out the incongruity between what the witness was saying on the stand and what he had previously said or written about Mr. Brandeis. Whenever he questioned a witness extensively, he delimited the scope of the testimony desired explicitly and in detail. His manner was grave and judicial; his acumen like the cold iridescence of a diamond. Characteristically, he knitted his right eyebrow, fixed the penetrating scrutiny of his left eye directly on the man before him, and then asked questions in a tone at once subdued yet so clear as to reach every corner of the room.

It was not easy to dissociate legal facts from the overwhelming personal prejudices of members of the Boston bar; and as each one testified, Walsh stubbornly insisted on ruling out remarks made against the personal reputation of Brandeis on the grounds that these had nothing to do with the facts in the case.

Since 1907 Brandeis had been the object of severe attack because of his vigorous conduct in exposing the machinations of the New York, New Haven, and Hartford system to absorb the Boston and Maine Railroad.¹¹ Before committees of the Massachusetts

¹⁰Walsh to Charles McDonnell, January 14, 1921; Walsh Papers.

¹¹U.S. Congress, Senate, Nomination of Louis D. Brandeis, Hearings before the subcommittee of the Committee on the Judiciary, U.S. Senate, 64 Cong., 1 sess., Document No. 409. (Washington: Government Printing Office, 1916), I, pp. 271, 499, 510, 620, 640, 715.

legislature and in public pamphlets he had denounced this proposed monopoly, laying bare the whole financial condition of the New Haven company. Quite naturally, his action in this case which so directly affected certain Boston financial interests had aroused a lasting bitterness. As Walsh remarked, "The timid deprecated his assaults and the guilty assailed him with unrestrained venom."¹²

Inspired news articles, many of them placed through Clarence W. Barron, editor of the Boston News Bureau, had carried on a relentless program of vilification against Brandeis. Even in January, 1916, the News Bureau carried an editorial by Barron describing him as the leader of forces which had smashed the credit of the New Haven system.¹³ Yet in the hearings it was revealed that he had received no fee for the services he had performed in that contest, having declined employment by the stockholders of the Boston and Maine that he might be untrammelled in this affair of public concern.¹⁴ Nor did his enemies charge that he was false to the courts, but only that he was "ruthless" in the attainment of his object, and not "scrupulous" in the methods by which he achieved them.

Whether Brandeis had been right or wrong in his warfare against the New Haven was of no particular importance to Walsh in the examination of the nominee's judicial fitness. Rather, he endeavored to establish the distinction between legal facts and professional animosities. With that purpose in mind he questioned Moorfield Storey, a member of the Boston bar and one of the formal protestants, as follows:

Senator Walsh. Is it your opinion that the conduct on the part of Mr. Brandeis was calculated unjustly to injure the New Haven Road?

Mr. Storey. I mean to say there is a radical lack of confidence in him among a representative class of men in the community in which I live, and which has existed for a good while.

Senator Walsh. Is some of that due to these recent activities in connection with the New Haven road?

Mr. Storey. No I do not think so.

Senator Walsh. I judge from what you say that people associated with that organization exercise a very powerful

¹²Ibid., Vol. II, p. 214.

¹³Boston News Bureau, January 19, 1916.

¹⁴Hearings, Vol. I, p. 991, 995.

influence, socially, politically, and financially in your community.

Mr. Storey. They did, certainly at one time.

Senator Walsh. So that a man would really not be in high favor with some of your best citizens who was engaged in exposing the iniquities of those people?

Mr. Storey. I do not think so.

Senator Walsh. Without desiring to question the soundness or accuracy of your own judgment about the matter, I want to satisfy myself, if I can, to what extent, if at all, the adverse opinion which you say is entertained toward him in your community has its origin or may have its origin in the fact that he has occupied a position antagonistic to those interests that are so powerful in your section of the country.¹⁵

From such testimony, in nowise showing any obliquity on the part of Mr. Brandeis, Walsh did, however, form an opinion of the New Haven directors: "These were the very high priests in the temple of Mammon."¹⁶

Another phase of the investigation turned upon Brandeis' action when employed by the Interstate Commerce Commission to resist an application for a five per cent increase made by the railroads in 1913. In closing his argument in that case he had declared that according to his view the existing rates did not yield sufficient returns. Then he had explained how they could be made adequate through readjustments and economies. Of course, the shippers branded this a betrayal of their cause and a violation of the trust vested in him by the Commission. Yet when Walsh questioned James S. Harlan, a member of that body, his testimony presented an altogether different interpretation:

Senator Walsh. What was your view as to the propriety or the impropriety of Mr. Brandeis expressing any such opinion ?

Mr. Harlan. It never occurred to me that there was any impropriety in it. On the contrary, as I view the situation, it was precisely the sort of view that we looked to counsel to express as the result of his study of the case and the record as it lay before us.¹⁷

This statement left the opponents "no leg to stand on so far as the rate case was concerned."¹⁸ Moreover, Walsh thought Brandeis' critics hard to please. In some cases they said "he should have

¹⁵Ibid., Vol. I, p. 272.

¹⁶Ibid., Vol. II, p. 214.

¹⁷Ibid., 164.

¹⁸Walsh to W. E. Purcell, May 20, 1916; Walsh Papers.

been more frank with the court; in this case, that he should have been less so."¹⁹

The opposition to Brandeis by ex-presidents of the American Bar Association had little weight with Walsh, inasmuch as he had long since formed an opinion of "the character and peculiarities of the gentlemen who direct its activities."²⁰ In their attitude toward railroad cases there was something more than an impersonal interest: "Under the old regime, practically everyone of them would have traveled to and from the place of meeting on a pass; I dare say more than a majority of them do now."²¹

He recalled the 1909 meeting of the Association in Seattle, when the celebrated code of ethics was reported which sought to stigmatize any attorney who prosecuted a case under a contingent fee. If such a ban could have been accomplished, nine-tenths of the cases instituted against the railroads would have fallen into the hands of inferior lawyers, and with this initial advantage the influence of high-grade counsel in defense of the roads would have been doubly enhanced when the case was appealed. Against this, Walsh had entered a protest, but without enough insistence. "Most of the sting was taken out of the paragraph I assailed, but I ought to have insisted on the excision of the whole thing."²²

Likewise, even now during the Brandeis controversy, Walsh was in disagreement with a majority of the Association. Whereas one of its special committees opposed the enactment of a law forbidding federal judges to comment on the evidence in a case, he had declared himself in favor of such a prohibition. There was still another subject on which he differed. Although many in the Association had gone on record in favor of reposing in the Supreme Court the power to prescribe uniform rules governing trials of action at law, Walsh as a member of the Judiciary Committee stood for the retention of the traditional procedure according to the individual State codes.

With a man of such independent action, the pressure of organized prejudice had no influence. He was a lawyer who adhered strictly to the facts of the record, and in this instance

¹⁹Hearings, Vol. II, p. 233.

²⁰Walsh to G. W. Anderson (United States Attorney, District of Massachusetts), March 18, 1916; Walsh Papers.

²¹Ibid.

²²Ibid.

the facts were on the side of Brandeis. Yet when the hearings ended, anonymous whispers--the last mean weapon of willful men in desperation--reached the Capitol corridors. One Senator heard that Brandeis had once expressed a disbelief in a written constitution. To another Senator it was reported that Brandeis had boldly asserted that nine Justices of the Supreme Court could not be restrained from responding to a demand of the people by a mere constitutional restriction. When these rumors attained ominous proportions, the Attorney General was constrained to request a statement from Brandeis on these reputed views.²³

Mr. Brandeis repudiated these assertions with disarming candor:

I have not only not said anything which anybody could have distorted into such a statement. My views in regard to the Constitution are as you know very much those of Mr. Justice Holmes.

It was sufficiently trying throughout two months of the hearings to have lies and misrepresentations spread in regard to me without the opportunity of being heard by the Committee and the public, but to have these lies circulated privately after the hearings are closed seems to me not in accord with American conceptions of fair play.²⁴

When Walsh received a copy of this letter from Gregory, he replied that there was no probability of any public charge being made concerning Mr. Brandeis' views of the Constitution "as a law binding in conscience," and that those who resorted to accusations of this kind would "confine themselves to private discussion and intimate communication."²⁵ As if purposely designed to repudiate the demagogic insinuations which such remarks had conveyed, Walsh wrote this sentence in his report: "Few who plead the cause of the great public escape the imputation from those whose privileges they seek to curtail of pandering to popular prejudice."²⁶

A few judges in Montana suspected that Brandeis believed certain classes of persons should be specially favored, in

²³T. W. Gregory to Louis D. Brandeis, April 12, 1916; Walsh Papers. Attorney General Gregory sent a copy of this letter to Senator Walsh

²⁴Louis D. Brandeis to T. W. Gregory, April 14, 1916; Walsh Papers. Gregory sent a copy of this letter only to Walsh, not to any other member of the Committee.

²⁵Walsh to T. W. Gregory, April 18, 1916; Walsh Papers.

²⁶Hearings, Vol. II, p. 232.

particular that labor should be a pet of the law. To these Walsh explained that while Brandeis was recognized as the father of industrial insurance in New England and that although he had defended the Oregon law regulating the hours of women workers, he had never been identified with the activities of organized labor as such. Even so, commented Walsh: "I should not regard that as an indication of intellectual inferiority."²⁷ What the members of the Supreme Court thought of the Brandeis appointment and the heated controversy it had engendered was not a matter of record, but Walsh remarked: "The impression is abroad that only Justice Van Devanter has felt any kind of pleasure at the prospect of Mr. Brandeis becoming an Associate Justice."²⁸

The campaign of active opposition continued with unabated virulence. Even after the hearings had closed, two Wall Street attorneys mailed copies of a brief against the confirmation of Brandeis to lawyers all over the country, not excepting the firm of Brandeis, Dunbar, and Nutter in Boston.²⁹ This "well-financed campaign," however, appeared reprehensible in the view of those who had all along advanced the strongest objections to Mr. Brandeis. "Both Senator Works and Senator Cummins declared before the committee with ill disguised contempt that the whole thing is utterly worthless."³⁰

Meanwhile, on April 3, Senator Walsh submitted his views on the confirmation of Brandeis in a report which analyzed every aspect of the thirteen hundred pages of testimony taken during the hearings. Commenting first upon the indisputably high intellectual capacity and professional attainments of the nominee, he pointed out that Brandeis' character had been assailed only as being too perverse to justify his confirmation by the Senate. In respect of protests of this kind, coming mainly from the Boston bar, it seemed imperative to recite in some detail the peculiar relations which the provincial interests of these objectors had to the law cases in which Mr. Brandeis had often been the opposing counsel.

²⁷Walsh to Judge William T. Pigott, April 18, 1916; Walsh Papers.

²⁸Walsh to Thomas P. Ivy, April 19, 1916; Walsh Papers.

²⁹T. W. Gregory to Walsh, April 27, 1916; Walsh Papers.

³⁰Walsh to T. W. Gregory, April 28, 1916; Walsh Papers.

In all, Walsh described the facts in eleven cases where Brandeis' conduct was said to have been unethical, and as he proceeded with each comprehensive summation he drew firm conclusions. With emphasis he remarked the lingering prejudice of Brandeis' erstwhile adversary in railroad litigation: "I should be loathe to believe that Mr. Storey carried to this day the animosity thus aroused but the opinion of a man often defies analysis."³¹

Although it was regrettable that a nation-wide controversy had arisen over this nomination, Walsh vigorously declined to follow those who said that another choice might better have been made without bitter contention:

It is easy for a brilliant lawyer so to conduct himself as to escape calumny and vilification. All he needs to do is to drift with the tide. If he never assails the doer of evil who stands high in the market place, either in court or before the public, he will have no enemies or detractors or none that he need heed. The man who never represents the public or the impecunious citizen in any great forensic contest, but always the cause of corporate wealth, never has these troubles.³²

If some conservative legal minds had followed the course of conventional respectability in their criticism of Brandeis, it was largely because their narrowness of understanding was excelled only by their timidity of judgment. Yet the first essential of honest action in this controversy, as Walsh saw it, was a judgment based upon the facts in the career of the nominee. In his opinion, Brandeis represented the spirit of "The Living Law," inasmuch that

The real crime of which this man is guilty is that he has exposed the iniquities of men in high places in our financial system. He has not stood in awe of the majesty of wealth. . . . He has been an iconoclast. He has written about and expressed views on 'social justice,' to which vague terms are referred movements and measures to obtain greater security, greater comfort, and better health for the industrial workers--signifying safety devices, factory inspection, sanitary provision, reasonable hours, the abolition of child labor, all of which threaten a reduction of dividends. They all contemplate that a man's a man and not a machine.³³

When this report was made public the Wall Street Journal called it "a shameful defence," showing Senator Walsh to be "more loyal to a new-found member of the Democratic party than Louis D.

³¹Hearings, Vol., II, p. 229.

³²Ibid., p. 234.

³³Ibid.

Brandeis has been to Democracy."³⁴

On May 10, the whole matter was recommitted to the subcommittee, and ten days later it was still impossible to predict the outcome, although it was rather certain that the Senate would vote to confirm regardless of the action to be taken by the Judiciary Committee.³⁵ Even this slight assurance was something of a triumph, inasmuch as at the outset in February "the atmosphere about the Capitol was not particularly pleasant for those who stood up for the nominee." Only the "resolute stand taken by a comparatively few members of both Houses" had changed "the feeling of pained surprise professed by many" to the quite general conviction that Brandeis was in every way worthy of the appointment.³⁶

Finally, on June 1, the Senate confirmed the appointment, and Walsh wrote: "I regard the outcome as a signal victory for the forces of democracy."³⁷ Indeed he felt that not only had the high standard of the Supreme Court in respect of professional standards been maintained but also that it had "been very desirably democratized to some extent by Mr. Brandeis becoming a part of it."³⁸

Throughout, Senator Walsh had sustained the burden of the battle with a hardihood that derived from deepest motives of democratic humanism. To him the confirmation of Brandeis seemed more significant when considered as the vindication of democratic principles rather than the vindication of a man. This he expressed in the following:

No doubt much of the hostility toward Mr. Brandeis had its origin in senseless racial prejudice, but I am altogether convinced that the more formidable part of the opposition sprang from the ardent sympathy he has displayed with the efforts in which some of us have been engaged to secure better conditions of life for the toiling masses. It has been a privilege to me to have had a part in demonstrating to the country that a man entertaining such views as he has professed

³⁴Wall Street Journal, April 11, 1916.

³⁵Walsh to Ransom Cooper, May 20, 1916; Walsh Papers.

³⁶Walsh to Representative W. R. Oglesby (New York), July 15, 1916; Walsh Papers.

³⁷Walsh to G. W. Anderson, June 9, 1916; Walsh Papers.

³⁸Walsh to Edward F. McClennen, June 9, 1916; Walsh Papers.

and engaging in such activities in the interest of the public as he has pursued, may yet hope for the highest honor which may come to a lawyer in this country.³⁹

Like all his other efforts to promote progressive legislation in the interest of national economic development, this acrimonious struggle for the confirmation of Brandeis bore witness to Walsh's honest regard for the principles of democratic government.

³⁹Walsh to M. Morris, June 19, 1916; Walsh Papers.

